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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 DIRECTV, INC., a California
13 corporation,

14 Plaintiff,

CIV. S-03-983 FCD PAN

15 v.

16 ROBERT PRIMER, et al.,

FINDINGS AND RECOMMENDATIONS

17 Defendants.
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19 On October 26, 2005, the Honorable Frank C. Damrell, Jr.,
20 reopened this case to proceed with plaintiff's motion for default
21 judgment pursuant to Fed. R. Civ. P. 55(b)(2) against remaining
22 defendant Gustavo Rodriquez. Plaintiff filed its motion for
23 default judgment against Rodriquez on July 26, 2004, but later
24 sought dismissal of the entire action which Judge Damrell
25 approved February 11, 2005. Judge Damrell reopened the case upon
26 plaintiff's showing its request for dismissal had been

1 inadvertent.

2 Plaintiff commenced this action May 9, 2003, alleging
3 that Rodriquez and others obtained unauthorized reception of
4 satellite signals in violation of 47 U.S.C. § 605(a),
5 unauthorized reception of electronic communications in violation
6 of 18 U.S.C. § 2511(1)(a), possession of pirate access devices in
7 violation of 18 U.S.C. § 2512(1)(b), and conversion.

8 The only allegation of the complaint specific to
9 Rodriquez states in full (Complaint, para. 13):

10 On or about July 20, 2000, defendant Gustavo Rodriquez
11 purchased a Pirate Access Device, consisting of a printed
12 circuit board device called a 'Wildthing 2 Unlooper,' from
13 Shutt [Shutt, Inc., an alleged source of pirate
technologies]. The device was shipped to defendant Gustavo
Rodriquez at defendant's address in Sacramento, California.

14 Default was entered against Rodriquez on December 24,
15 2003, due to his failure to appear or otherwise respond to the
16 complaint despite personal service of process October 6, 2003.

17 Plaintiff moves for default judgment for \$10,000.00
18 statutory damages pursuant to 18 U.S.C. § 2520(c)(2)(B) for one
19 violation of 18 U.S.C. §§ 2511(1)(a), plus post-judgment interest
20 pursuant to 28 U.S.C. § 1961.

21 By his default defendant admitted the well-pleaded
22 allegations of the complaint except damages. Fed. R. Civ. P.
23 8(d). Accordingly, defendant Rodriquez admits unauthorized
24 purchase of a pirate access device; he admits neither how long he
25 possessed the device nor even that he used it.

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18 U.S.C. § 2511(1) (a) is a criminal statute applicable to "any person who (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."¹ 18 U.S.C. § 2520(a) creates a private right of action under 18 U.S.C. § 2511, and 18 U.S.C. § 2520(c) (2) permits an award of damages calculated according to "the greater of" (1) actual damages, (2) \$100 a day for each day of violation, or (3) \$10,000.²

There is no matter of right to the entry of default judgment and it is within the court's reasonable discretion, even when the defendant is technically in default. Lewis v. Lynn, 236 F.3d 766, 767 (5th Cir. 2001); Draper v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). A court should consider the following factors before entering default judgment: "(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at

¹ 18 U.S.C. § 2511(1) (a) provides "any person who-intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished as provided in subsection (4) ['fined under this title or imprisoned not more than five years, or both'] or shall be subject to suit as provided in subsection (5) [authorizing federal government to seek injunctive relief and fine].";

² 18 U.S.C. § 2520(c) (2) provides "In any other action under this section, the court may assess as damages whichever is the greater of-(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000."

1 stake in the action, (5) the possibility of a dispute concerning
2 material facts, (6) whether the default was due to excusable
3 neglect, and (7) the strong policy underlying the Federal Rules
4 of Civil Procedure favoring decisions on the merits." Eitel v.
5 McCool, 782 F.2d 1470, 1472 (9th Cir. 1986), at 1471-1472, citing
6 6 Moore's Federal Practice ¶ 55-05[2], at 55-24 to 55-26.

7 Application of these factors demonstrates the complaint
8 is insufficiently plead to support a finding Rodriquez admits the
9 material allegations of 18 U.S.C. § 2511(1)(a) or that the injury
10 to DirecTV meets the requirements of 18 U.S.C. § 2520(a). The
11 former statute penalizes the actual interception or attempt to
12 intercept plaintiff's electronic communication; the latter
13 requires that plaintiff's electronic communication be
14 "intercepted, disclosed, or intentionally used." None of these
15 material facts are alleged against Rodriquez-the complaint
16 alleges no more than Rodriquez' purchase of a pirate access
17 device. Cf., Nalley v. Nalley, 53 F.3d 649, 653 (4th Cir. 1995)
18 (court may decline to award statutory damages under 18 U.S.C. §
19 2520(c)(2) where violation is *di minimis*); DirecTV, Inc. V. Kaas,
20 294 F.Supp.2d 1044, 1049 (N.D. Iowa 2003) (presumptive award of
21 \$10,000 is excessive where DirecTV offered no evidence of actual
22 damages or duration of defendant's use of pirate access device).
23 At most, Rodriquez' purchase may be actionable pursuant to 18
24 U.S.C. § 2512(1)(b) (making criminal the possession of an
25 interception device received by mail); however, 18 U.S.C. § 2520
26 does not create a private right of action for mere possession.

